



January 27, 2021

SENATE BILL No. 389

DIGEST OF SB 389 (Updated January 25, 2021 12:59 pm - DI 141)

Citations Affected: IC 13-11; IC 13-14; IC 13-18; IC 13-30; IC 14-28; IC 35-52; noncode.

Synopsis: Repeals state regulated wetlands law. Repeals the law requiring a permit from the department of environmental management for wetland activity in a state regulated wetland. Makes corresponding changes to eliminate references to that law. States that the repeal of that law is not intended to affect: (1) the regulation in Indiana under the federal Clean Water Act of the discharge of dredged or fill material into waters of the United States; or (2) the authorization of the state of Indiana to administer the National Pollutant Discharge Elimination System permit program. Provides that the repeal of that law extinguishes any judicial or administrative proceeding concerning an alleged violation of IC 13-18-22, an administrative rule concerning IC 13-18-22, or the terms of a permit issued under IC 13-18-22.

Effective: July 1, 2021.

**Garten, Messmer, Rogers, Baldwin,
Zay, Sandlin, Doriot, Gaskill,
Niemeyer, Brown L, Freeman, Koch,
Houchin, Busch, Crane**

January 14, 2021, read first time and referred to Committee on Environmental Affairs.
January 26, 2021, amended, reported favorably — Do Pass.

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January 27, 2021

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

SENATE BILL No. 389

A BILL FOR AN ACT to amend the Indiana Code concerning environmental law.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 13-11-2-25.8 IS REPEALED [EFFECTIVE JULY
2 1, 2021]. Sec. 25.8: (a) For purposes of IC 13-18:
3 (1) "Class I wetland" means an isolated wetland described by one
4 (1) or both of the following:
5 (A) At least fifty percent (50%) of the wetland has been
6 disturbed or affected by human activity or development by one
7 (1) or more of the following:
8 (i) Removal or replacement of the natural vegetation;
9 (ii) Modification of the natural hydrology;
10 (B) The wetland supports only minimal wildlife or aquatic
11 habitat or hydrologic function because the wetland does not
12 provide critical habitat for threatened or endangered species
13 listed in accordance with the Endangered Species Act of 1973
14 (16 U.S.C. 1531 et seq.) and the wetland is characterized by at
15 least one (1) of the following:
16 (i) The wetland is typified by low species diversity;
17 (ii) The wetland contains greater than fifty percent (50%)

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areal coverage of non-native invasive species of vegetation:

(iii) The wetland does not support significant wildlife or aquatic habitat.

(iv) The wetland does not possess significant hydrologic function;

(2) "Class II wetland" means:

(A) an isolated wetland that is not a Class I or Class III wetland; or

(B) a type of wetland listed in subdivision (3)(B) that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type; and

(3) "Class III wetland" means an isolated wetland:

(A) that is located in a setting undisturbed or minimally disturbed by human activity or development and that supports more than minimal wildlife or aquatic habitat or hydrologic function; or

(B) unless classified as a Class II wetland under subdivision (2)(B); that is of one (1) of the following rare and ecologically important types:

(i) Acid bog;

(ii) Acid seep;

(iii) Circumneutral bog;

(iv) Circumneutral seep;

(v) Cypress swamp;

(vi) Dune and swale;

(vii) Fen;

(viii) Forested fen;

(ix) Forested swamp;

(x) Marl beach;

(xi) Muck flat;

(xii) Panne;

(xiii) Sand flat;

(xiv) Sedge meadow;

(xv) Shrub swamp;

(xvi) Sinkhole pond;

(xvii) Sinkhole swamp;

(xviii) Wet floodplain forest;

(xix) Wet prairie;

(xx) Wet sand prairie;

(b) For purposes of this section, a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but



has not been obtained:

SECTION 2. IC 13-11-2-29, AS AMENDED BY P.L.189-2018, SECTION 107, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 29. "Clean Water Act", for purposes of this chapter ~~IC 13-18-22~~; and IC 13-18-23, refers to:

(1) 33 U.S.C. 1251 et seq.; and

(2) regulations adopted under 33 U.S.C. 1251 et seq.

SECTION 3. IC 13-11-2-36.3 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. ~~36.3~~. "Compensatory mitigation", for purposes of ~~IC 13-18-22~~, means the:

(1) restoration; or

(2) creation;

of wetlands to offset or compensate for a loss of wetlands resulting from an authorized wetland activity. Wetlands enlargement, enhancement, and preservation may be considered compensatory mitigation on a case-by-case basis, particularly for Class III wetlands.

SECTION 4. IC 13-11-2-74.5 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 74.5. (a) "Exempt isolated wetland", for purposes of ~~IC 13-18~~ and environmental management laws, means an isolated wetland that:

(1) is a voluntarily created wetland unless:

(A) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act or ~~IC 13-18-22~~;

(B) the wetland is reclassified as a state regulated wetland under ~~IC 13-18-22-6(c)~~; or

(C) the owner of the wetland declares, by a written instrument:

(i) recorded in the office of the recorder of the county or counties in which the wetland is located; and

(ii) filed with the department;

that the wetland is to be considered in all respects to be a state regulated wetland;

(2) exists as an incidental feature in or on:

(A) a residential lawn;

(B) a lawn or landscaped area of a commercial or governmental complex;

(C) agricultural land;

(D) a roadside ditch;

(E) an irrigation ditch; or

(F) a manmade drainage control structure;

(3) is a fringe wetland associated with a private pond;



- 1 (4) is; or is associated with; a manmade body of surface water of
 2 any size created by:
 3 (A) excavating;
 4 (B) diking; or
 5 (C) excavating and diking;
 6 dry land to collect and retain water for or incidental to
 7 agricultural; commercial; industrial; or aesthetic purposes;
 8 (5) subject to subsection (c); is a Class I wetland with an area; as
 9 delineated; of one-half (1/2) acre or less;
 10 (6) subject to subsection (d); is a Class II wetland with an area; as
 11 delineated; of one-fourth (1/4) acre or less;
 12 (7) is located on land:
 13 (A) subject to regulation under United States Department of
 14 Agriculture wetland conservation programs; including
 15 Swampbuster and the Wetlands Reserve Program; because of
 16 voluntary enrollment in a federal farm program; and
 17 (B) used for agricultural or other purposes allowed under the
 18 programs referred to in clause (A); or
 19 (8) is constructed for reduction or control of pollution;
 20 (b) For purposes of subsection (a)(2); an isolated wetland exists as
 21 an incidental feature:
 22 (1) if:
 23 (A) the owner or operator of the property or facility described
 24 in subsection (a)(2) does not intend the isolated wetland to be
 25 a wetland;
 26 (B) the isolated wetland is not essential to the function or use
 27 of the property or facility; and
 28 (C) the isolated wetland arises spontaneously as a result of
 29 damp soil conditions incidental to the function or use of the
 30 property or facility; and
 31 (2) if the isolated wetland satisfies any other factors or criteria
 32 established in rules that are:
 33 (A) adopted by the board; and
 34 (B) not inconsistent with the factors and criteria described in
 35 subdivision (1);
 36 (c) The total acreage of Class I wetlands on a tract to which the
 37 exemption described in subsection (a)(5) may apply is limited to the
 38 larger of:
 39 (1) the acreage of the largest individual isolated wetland on the
 40 tract that qualifies for the exemption described in subsection
 41 (a)(5); and
 42 (2) fifty percent (50%) of the cumulative acreage of all individual



isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(5) but for the limitation of this subsection.

(d) The total acreage of Class H wetlands on a tract to which the exemption described in subsection (a)(6) may apply is limited to the larger of:

(1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(6); and

(2) thirty-three and one-third percent (33 1/3%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(6) but for the limitation of this subsection.

(e) An isolated wetland described in subsection (a)(5) or (a)(6) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under subsection (a)(5) or (a)(6) consistent with the applicable limitations described in subsections (c) and (d):

SECTION 5. IC 13-11-2-104.7 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 104.7: "In lieu fee mitigation program", for purposes of IC 13-18-22-6; means a program under which a person proposing a wetland activity in a state regulated wetland provides funds to a third party that will use the funds to offset the loss of wetlands resulting from the proposed wetland activity:

SECTION 6. IC 13-11-2-221.5 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 221.5: "State regulated wetland", for purposes of IC 13-18; means an isolated wetland located in Indiana that is not an exempt isolated wetland:

SECTION 7. IC 13-11-2-265.6 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 265.6: "Wetland activity", for purposes of IC 13-18-22; means the discharge of:

- (1) dredged; or
- (2) fill;

material into an isolated wetland:

SECTION 8. IC 13-11-2-265.8 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 265.8: "Wetlands delineation" or "delineation"; for purposes of section 74.5 of this chapter; means a technical assessment:

- (1) of whether a wetland exists on an area of land; and
- (2) if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics; as determined consistently with the Wetlands Delineation Manual; Technical



~~Report Y-87-1 of the United States Army Corps of Engineers.~~

SECTION 9. IC 13-14-9-3, AS AMENDED BY P.L.100-2006, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. (a) ~~Except as provided in subsection (b),~~ The department shall provide notice in the Indiana Register of the first public comment period required by section 2 of this chapter. A notice provided under this section must do the following:

(1) Identify the authority under which the proposed rule is to be adopted.

(2) Describe the subject matter and the basic purpose of the proposed rule. The description required by this subdivision must:

(A) list all alternatives being considered by the department at the time of the notice;

(B) state whether each alternative listed under clause (A) creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;

(C) state the extent to which each alternative listed under clause (A) differs from federal law;

(D) include any information known to the department about the potential fiscal impact of each alternative under clause (A) that creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;

and

(E) set forth the basis for each alternative listed under clause (A).

(3) Describe the relevant statutory or regulatory requirements or restrictions relating to the subject matter of the proposed rule that exist before the adoption of the proposed rule.

(4) Request the submission of alternative ways to achieve the purpose of the proposed rule.

(5) Request the submission of comments, including suggestions of specific language for the proposed rule.

(6) Include a detailed statement of the issue to be addressed by adoption of the proposed rule.

~~(b) This section does not apply to rules adopted under IC 13-18-22-2, IC 13-18-22-3, or IC 13-18-22-4.~~



(e) (b) The notice required under subsection (a) shall be published electronically in the Indiana Register under procedures established by the publisher.

SECTION 10. IC 13-18-22 IS REPEALED [EFFECTIVE JULY 1, 2021]. (State Regulated Wetlands).

SECTION 11. IC 13-30-10-6 IS REPEALED [EFFECTIVE JULY 1, 2021]. Sec. 6: (a) A person who:

(1) knowingly or intentionally violates:

(A) the terms of a permit issued under IC 13-18-22 that relates to state regulated wetlands; or

(B) a statute that relates to state regulated wetlands; and

(2) causes substantial harm to a state regulated wetland; commits a Level 6 felony:

(b) Notwithstanding IC 35-50-2-6(a); IC 35-50-2-7(a); or IC 35-50-3-2; the court may order a person convicted under this section to pay:

(1) a fine of at least five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000) for each day of violation; or

(2) if the person has a prior unrelated conviction for an offense under this title that may be punished as a felony; a fine of not more than one hundred thousand dollars (\$100,000) for each day of violation.

In determining the amount of a fine imposed for a violation of this section; the court shall consider any improper economic benefit; including unjust enrichment; received by the defendant as a result of the unlawful conduct.

SECTION 12. IC 14-28-1-37, AS ADDED BY P.L.214-2014, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 37. The department and the department of environmental management shall, not later than January 1, 2015, develop and implement a process to improve efficiency and transparency in programs for:

(1) water quality certifications from the department of environmental management under IC 13-13-5-1(1) and Section 401 of the federal Clean Water Act (33 U.S.C. 1341); and

(2) permits from the department of environmental management for wetland activity in a state regulated wetland under IC 13-18-22; and

(3) (2) permits from the director for a structure, obstruction, deposit, or excavation in a floodway under IC 14-28-1.

SECTION 13. IC 14-28-1-38, AS ADDED BY P.L.214-2014, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE



JULY 1, 2021]: Sec. 38. (a) As used in this section, "permit" means any of the following:

(1) A water quality certification from the department of environmental management under IC 13-13-5-1(1) and Section 401 of the federal Clean Water Act (33 U.S.C. 1341).

~~(2) A permit from the department of environmental management for wetland activity in a state regulated wetland under IC 13-18-22.~~

~~(3)~~ (2) A permit from the director for a structure, obstruction, deposit, or excavation in a floodway under IC 14-28-1.

(b) In establishing the process required under section 37 of this chapter, the department and the department of environmental management shall do the following:

(1) Determine:

(A) how to inform a person who proposes to perform work for which a permit is required of the need to seek a permit for the work; and

(B) how to ensure that a person proposing to perform work for which a permit is required is informed of every state permit the person needs in order to do the work.

(2) Change the:

(A) application forms;

(B) application processes; or

(C) application forms and application processes;

used by the department and the department of environmental management for purposes of permits as necessary to ensure that a person proposing to perform work for which a permit is required is not required to provide the same information separately to the department and the department of environmental management.

(3) Determine how either the department or the department of environmental management may serve as the single point of contact, for purposes of:

(A) distributing and receiving permit applications;

(B) obtaining information needed to complete the processing of permit applications; and

(C) issuing permits;

for an applicant who does not need to have independent contact with the department that is not serving as the single point of contact.

(4) Create an internal process to ensure that the appropriate office within the department and the department of environmental management receives and timely reviews each permit application.



(5) Ensure that the processing of each permit application is monitored.

SECTION 14. IC 35-52-13-16 IS REPEALED [EFFECTIVE JULY 1, 2021]. ~~Sec. 16. IC 13-30-10-6 defines a crime concerning the environment.~~

SECTION 15. [EFFECTIVE JULY 1, 2021] (a) The general assembly declares that, in repealing IC 13-18-22, it does not intend to affect in any way:

(1) the regulation in Indiana of the discharge of dredged or fill material into waters of the United States, including wetlands, under Section 404 of the federal Clean Water Act (33 U.S.C. 1344); or

(2) the authorization of the state of Indiana to administer the National Pollutant Discharge Elimination System permit program under Section 402 of the federal Clean Water Act (33 U.S.C. 1342).

(b) This SECTION expires July 1, 2022.

SECTION 16. [EFFECTIVE JULY 1, 2021] (a) The repeal of IC 13-18-22 by this act extinguishes any judicial or administrative proceeding initiated by the department of environmental management or the commissioner of the department of environmental management concerning an alleged violation of:

(1) IC 13-18-22;

(2) a rule adopted by the environmental rules board concerning IC 13-18-22; or

(3) the terms of a permit issued under IC 13-18-22.

(b) This SECTION expires July 1, 2022.



COMMITTEE REPORT

Madam President: The Senate Committee on Environmental Affairs, to which was referred Senate Bill No. 389, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 9, after line 17, begin a new paragraph and insert:

"SECTION 16. [EFFECTIVE JULY 1, 2021] (a) The repeal of IC 13-18-22 by this act extinguishes any judicial or administrative proceeding initiated by the department of environmental management or the commissioner of the department of environmental management concerning an alleged violation of:

(1) IC 13-18-22;

(2) a rule adopted by the environmental rules board concerning IC 13-18-22; or

(3) the terms of a permit issued under IC 13-18-22.

(b) This SECTION expires July 1, 2022."

and when so amended that said bill do pass.

(Reference is to SB 389 as introduced.)

MESSMER, Chairperson

Committee Vote: Yeas 8, Nays 3.

